SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 1.

JOSÉ ANTONIO FERNANDEZ Y PEREZ, PLAINTIFF IN ERROR,

vs.

JOSE PEREZ Y FERNANDEZ.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

Opposition of Defendant in Error to Motion for an Order Directing the District Court to Issue a Writ of Restitution Herein.

Where the specific thing of which a party to the cause has been deprived by a judgment, subsequently reversed on appeal, or the amount that he has lost or paid under compulsion *appears* of *record*, a writ of restitution will ordinarily be granted upon motion. The right to such relief has been recognized in the law of England from early times.

In ANONYMOUS, 2 Salkeld, 588, Holt, C. J., held that—

"where the plaintiff has execution, *and the money is levied and paid*, and that judgment is afterwards reversed, there

because it appears on the record that the money is paid, the party shall have restitution without a *scire facias*, and there is a certainty of what was lost; otherwise where it was levied but not paid; there must then be a *scire facias* suggesting the matter of fact, viz. the sum levied," etc.

This same doctrine has been fully recognized by this court.

Bank of U. S. *vs.* Bank of Washington, 6 Peters, 8, 17.
Northwestern Fuel Co. *vs.* Brock, 139 U. S., 216, 219.

In the bank case above cited, where the mode of procedure to effect restitution was under discussion, this court said:

"Sometimes it is done by a writ of restitution, without a *scire facias, when the record shows the money has been paid*, and there is a certainty as to what has been lost. In other cases a *scire facias* may be necessary to ascertain what is to be restored. 2 Salkeld, 587–'8; Tidd's Prac., 936, 1137–'8. And no doubt, circumstances may exist where an action may be sustained to recover back the money."

In the case at bar it does not appear from the record or otherwise that the execution which was issued pursuant to the judgment here reversed was levied, or what, if any amount, was ever paid on account thereof.

Counsel for plaintiff in error in their motion under discussion say:

"We are advised that the execution was subsequently levied upon the property of plaintiff in error and the full amount of the judgment collected."

This is the only suggestion appearing anywhere in connection with the case that the judgment has been executed in whole or in part, and is not a sufficient showing under

the authorities relied upon by the applicants for restitution to justify such relief.

The right of applicants to restitution not being clear upon the record as now constituted, the entire matter should be left to the action of the trial court, which, upon application, would doubtless issue promptly a *scire facias quare restitutionem habere non debet.*

It is submitted that the pending motion should be denied.

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